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Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY & TRECKER CORPORATION IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2
Argument	5
I. Certiorari Should Be Denied Since No Substantial Federal Question Is Presented	5
II. The Decision Of The Wisconsin Court Does Not Conflict With The Prior Decisions Of This Court	8
III. There Is No Reason For This Court To Overrule Its Decision In *Briggs and Stratton* And To Radically Alter The Preemption Standards Established In *Garmon*	14
Conclusion	16

CITATIONS

Cases:

Amalgamated Ass'n. of Street, etc. Employees v. Lockridge, 403 U.S. 274 (1971)	14, 15
C. G. Conn, Ltd. v. NLRB, 108 F. 2d 390 (7th Cir. 1939)	9
Decision, Inc., 166 NLRB 464 (1967)	5
Daniel A. Donovan, et al., 206 NLRB No. 108 (1973)	9

Page

First National Bank of Omaha v. NLRB, 413 F. 2d 921 (8th Cir. 1969) 5

Garner et al. v. Teamsters, etc. Local No. 776 et al., 346 U.S. 485 (1953) 5, 10

Honolulu Rapid Transit Co., 110 NLRB 1806 (1954) 9

International Union, etc. (UAW-CIO) v. Russell, 356 U.S. 634 (1958) 12

International Union, U.A.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) 5, 7, 8, 9, 10, 12, 13, 14, 15

Local 20, Teamsters, etc. v. Morton, 377 U.S. 252 (1964) 10, 11, 12, 13, 14, 15

NLRB v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477 (1960) 13, 14

Polytech, Inc., 195 NLRB 695 (1972) 5, 6

Prince Lithograph Co., Inc., 205 NLRB No. 23 (1973) 5

San Diego Building Trades Council, et al. v. Garmon, et al., 359 U.S. 236 (1959) ..4, 5, 10, 11, 12, 14, 15

John S. Swift Co., Inc., 124 NLRB 394; enf'd on this point, 277 F. 2d 641 (7th Cir. 1960) 5

United Automobile, A, & A.I.W. of America v. Wisconsin Employment Relations Board, et. al., 351 U.S. 266 (1956) 12

Valley City Furniture Co., 110 NLRB 1589 (1954) 5, 6, 7, 9

Wisconsin Statute:

Section 111.06(2)(h) 4

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203 (1975), and reprinted in Appendix B of the Petition (Pet. App. A-2 ff.). The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are not officially reported but appear as Appendix C and Appendix D to the Petition (Pet. App. A-15 ff. and A-22 ff.). The Circuit Court decision is unofficially reported at 88 LRRM 2920.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

May the State of Wisconsin prohibit a Union-directed concerted refusal to work overtime, a partial-strike activity which is neither protected nor prohibited by Federal law?

STATUTES INVOLVED

The relevant constitutional and statutory provisions are included in Appendix E of the Petition (Pet. App. A-52 ff.).

STATEMENT OF THE CASE

The Kearney & Trecker Corporation ("Kearney & Trecker" or "Employer") is engaged in the manufacture of machine tools at West Allis, Wisconsin. At all times relevant hereto, the hourly employees at Kearney & Trecker Corporation have been represented by Lodge 76, International Association of Machinists and Aerospace Workers ("Union" or "Lodge 76").

Prior to March 7, 1972, Kearney & Trecker employees represented by Lodge 76 had been scheduled for and had worked a "substantial amount" of overtime (A. App.[1] 154). In fact, on Saturday, March 4, 1972, approximately 354 employees worked overtime (Co. Ex. 1; A. App. 156; Supp. App.[2] 102; R. 86). Although employees

[1] Appellant's Appendix in the Supreme Court of Wisconsin ("A. App.").

[2] Intervenor-Respondent's Appendix in the Supreme Court of Wisconsin ("Supp. App.").

had previously been allowed, individually, to refuse overtime, there had been no general, or concerted, refusal to do so (A. App. 154). Only five percent of the employees had consistently declined to work overtime (A. App. 154).

On March 7, 1972, while negotiations for a new labor agreement were continuing, the members of the Union met pursuant to notice from the Union and unanimously adopted a resolution directing that no member should work overtime, overtime being defined as working in excess of 7½ hours per day or 37½ hours per week (A. App. 153, 159; R. 104-105). On March 16, representatives of the Union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the members "will continue in effect until a labor agreement is signed" (Ex. 13; R. 80, 160; A. App. 155). Despite requests from Kearney & Trecker, the Union declined to ask the membership to rescind the ban on overtime (A. App. 155). From March 11, 1972 until July 23, 1972 no employees worked overtime (with the exception of three employees who worked overtime on only one day), even though the Employer had scheduled many of the employees for overtime on numerous occasions during that period (A. App. 155-158).

On June 12, 1972, the Employer filed a charge with the National Labor Relations Board ("NLRB") alleging, among other things, that the Union had violated Section 8(b)(3) of the National Labor Relations Act, as amended, ("NLRA") 29 U.S.C. §158(b)(3), by its ban on overtime (Co. Ex. 7; A. App. 147-150). On June 27, 1972 the NLRB Regional Director refused to issue a complaint on the ground that the Union's action was not

prohibited by the NLRA (Co. Ex. 3; A. App. 144-146). That refusal stated, in part:

> "Dismissal by this Agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act." (Co. Ex. 3; A. App. 145).

On June 15, 1972, the Employer filed a complaint with the Wisconsin Employment Relations Commission ("WERC") (A. App. 127). After a hearing, a WERC examiner found, on February 26, 1973, that the Union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the Employer's production and that the Union had therefore violated Section 111.06 (2) (h), Wis. Stats., which prohibits, *inter alia,* engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (Petition Appendix ["Pet. App."] A-53). The examiner rejected the Union's challenge to the WERC's jurisdiction on the basis of this Court's decision in *Garmon,*[1] concluding that "a concerted refusal to work overtime is neither a protected activity under Section 7 [of the NLRA] nor a prohibited activity under Section 8 of the [NLRA]" (Pet. App. A-48). The WERC unanimously adopted the examiner's decision as its own on April 23, 1973 (Pet. App. A-22-23). On August 24, 1973 that decision was affirmed by the Circuit Court of Milwaukee County which also rejected Petitioners' preemption arguments on the basis of prior decisions of this Court (Pet. App. A-15-19).

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[1] *San Diego Building Trades Council, et al. v. Garmon et al.,* 359 U.S. 236 (1959).

The Union then appealed to the Wisconsin Supreme Court. On appeal, the Union did not deny that it had violated the statute in question, but again argued that Wisconsin's authority to enjoin such conduct had been preempted by Federal law. Relying on prior decisions of this Court, including those in *Garmon, Garner,*[2] and *Briggs and Stratton,*[3] the Wisconsin Court unanimously rejected the Union's argument stating "since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the Federal Labor Act the judgment appealed from must be affirmed" (Pet. App. A-14).

ARGUMENT

I. CERTIORARI SHOULD BE DENIED SINCE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The challenged decision of the Wisconsin Supreme Court simply upheld the authority of Wisconsin to enjoin a union-directed concerted refusal to work overtime, a very specific, seldom used partial-strike tactic which has been *uniformly* held to be beyond the protection of Federal law by a long line of NLRB and Federal Court decisions. One of the many[4] such cases is *Valley City*

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[2] *Garner et al. v. Teamsters, etc. Local No. 776, et al.,* 346 U.S. 485 (1953).

[3] *International Union, UA.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), commonly referred to as *"Briggs and Stratton."*

[4] *E.g., John S. Swift Co.,* 124 NLRB 394 (1959), *modified and enf'd,* 277 F.2d 641 (7th Cir. 1960); *Decision, Inc.,* 166 NLRB 464 (1967); *First National Bank of Omaha v. NLRB,* 413 F.2d 921, 925 (8th Cir. 1969); *Prince Lithograph Co., Inc.,* 205 NLRB No. 23, 83 LRRM 1654, 1973 CCH NLRB ¶25,614; *Valley City Furniture Co.,* 110 NLRB 1589 (1954); *Polytech, Inc.,* 195 NLRB 695 (1972).

Furniture Co., 110 NLRB 1589 (1954), where, as here, the Union had resolved during bargaining to cease working overtime. The NLRB held that refusal to be unprotected, stating at 1594-1595:

> "We find that the partial strike [refusal of overtime] called by the Union from its very inception was the sort of activity which, although concerted, *is not,* as against the action by the Respondent, *entitled to the protection of the Act.* The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. . . ." (Emphasis supplied).

The Board only recently reaffirmed and explained this line of decisions in *Polytech, Inc.*, 195 NLRB 695, 696 (1972), stating:

> "The holding . . . that the concerted refusal to work overtime was unprotected, reasons that when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay. The principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform *all of the work they were hired to do.*" (Emphasis supplied).

Contrary to Petitioners' assertion, the Wisconsin Court's decision, by its very terms, has *no impact whatsoever* on Federally protected strike activities or on the Federal regulation of activities proscribed by Federal law (Pet. App. A-8, 12, 14). That decision does not in any way expand, or seek to expand, the limited role of the states in the field of labor relations. On the contrary,

the Wisconsin Court expressly recognized in its decision that,

> ". . . a State may not regulate conduct arguably 'protected by sec. 7 or prohibited by sec. 8' of the National Labor Relations Act, . . . and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." (Pet. App. A-8).

The Wisconsin Court did conclude, correctly, on the basis of this Court's prior holdings, that a concerted refusal to work overtime is *neither* arguably protected nor prohibited, and that no legislative purpose precludes state action against such conduct.

Petitioners' predictions of grave consequences and infringements on protected rights if this decision is not reversed are totally unfounded. The Wisconsin statutory provision in question has been in existence in its present form for *36 years*. The authority of Wisconsin to utilize that very provision to prohibit *very similar* conduct was upheld by this Court *26 years ago* in *"Briggs and Stratton."*[5] Surely any such grave consequences would have occurred long ago — and Petitioners cite none. Moreover, this case is the *only reported instance*[6] during those 36 years in which Wisconsin has enjoined or even been asked to enjoin a concerted refusal to work overtime (Pet. App. A-49).

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[5] *International Union, U.A.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

[6] Undoubtedly, this tactic is not used more frequently precisely because it *is* unprotected under Federal law and participating employees may be disciplined by the employer. *E.g., Valley City Furniture Co.*, 110 NLRB 1589 (1954). *This* case arose because the employer chose to enjoin the perpetrating Union rather than discipline the individual employees who had been directed by the Union partially to withhold their services.

Having had no restraining effect upon strike activities or other concerted conduct protected by Federal law and being directed solely at the limited partial-strike conduct held *not* federally-protected by the NLRB and by the Federal courts, the policy of Wisconsin heretofore approved by this Court in *Briggs and Stratton* and now embodied in the decision of the Court below is one of extremely limited impact, and clearly does not present a substantial federal question. The Wisconsin Court's decision here, is thus not one appropriate for review by this Court.

II. THE DECISION OF THE WISCONSIN COURT DOES NOT CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

Petitioners try to show that the decision below is inconsistent with prior decisions of this Court, but that is simply not the case. To the contrary, this Court affirmed Wisconsin's right to enjoin *very similar conduct* on the basis of this very statute in *"Briggs and Stratton", supra.* There, the union in order to put pressure on the employer, called a series of union meetings during working hours and the WERC,[7] on the basis of the instant statute, issued an order enjoining the conduct. On appeal, this Court affirmed Wisconsin's right to forbid that conduct, stating (336 U.S. at 264-265):

> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was *neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act.* . . .

[7] Then known as Wisconsin Employment Relations Board ("WERB").

> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." (Emphasis supplied).

The Union's conduct, here, being quite similar to that involved in *Briggs and Stratton,* that holding is equally applicable to this case. In both cases, the Union allowed its members to work only a portion of their normal hours, thereby putting substantial economic pressure on the employer without imposing on the Union members the consequences of a strike. Both activities have repeatedly been held by the NLRB to constitute unprotected partial strikes. *E.g., Valley City Furniture Co., supra,* (concerted refusal to work overtime); *Daniel A. Donovan, et al.,* 206 NLRB No. 108, 1973 CCH NLRB ¶25,888, 85 LRRM 1227 (intermittent work stoppages); *Honolulu Rapid Transit Co.,* 110 NLRB 1806 (1954) (intermittent work stoppages).

This Court in *Briggs and Stratton* clearly indicated that its holding in that case was equally applicable to a concerted refusal to work overtime. In concluding that the work stoppages were not protected by Section 7 of the NLRA, this Court cited "similar cases" holding "comparable work stoppages" to be unprotected, including *C. G. Conn, Ltd. v. NLRB,*[8] which held a *concerted refusal to work overtime* to be unprotected. 336 U.S. at 257.

Notwithstanding Petitioners' assertions, the Wisconsin Court correctly concluded that *Briggs and Stratton* has never been overruled (Pet. App. A-13). Although this

[8] 108 F.2d 390 (7th Cir. 1939).

Court did decline, in *Garmon,* to follow the "approach" of *Briggs and Stratton,* under which the Court itself, rather than the NLRB, determined the protected or prohibited nature of the activity, that decision left untouched its substantive holding.[9] In fact, the continued vitality of the Court's substantive ruling in *Briggs and Stratton* was expressly confirmed by the concurring opinion in *Garmon*:

> "The Court may be correct in stating that 'the approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no preemption when the conduct charged is in fact neither protected nor prohibited. To the contrary, that holding has remained fully intact, . . ." (359 U.S. at 253, n. 5).

The decision here is also *fully* consistent with this Court's decision in *Garmon*[10] setting forth the controlling principles of federal preemption. There this Court stated,

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due

[9] The other decisions relied upon by Petitioners also do not support their contention that *Briggs and Stratton* has been overruled. In fact, the decision in *Garner, et al. v. Teamsters, etc. Local No. 776, et al.,* 346 U.S. 485 (1953) not only distinguished *Briggs and Stratton* but also cited it with *approval.* Similarly, the decision in *Local 20, Teamsters etc. v. Morton,* 377 U.S. 252 (1964) recognized only a very limited exception to the protected-prohibited test set forth in *Garmon* and did not overrule *Briggs and Stratton,* either expressly or by implication.

[10] *San Diego Building Trades Council, et al. v. Garmon, et al.,* 359 U.S. 236 (1959).

> regard for the federal enactment requires that state jurisdiction must yield."
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> ". . . When an activity is *arguably subject to §7 or §8 of the Act,* the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 244-245; Emphasis supplied).

But, as the Wisconsin Court correctly found, the conduct here is *not even arguably* protected or prohibited by Federal law. The long line of NLRB and Federal court cases conclusively establishing the unprotected nature of this conduct has already been noted,[11] and not even the Union alleges that such conduct was arguably prohibited. Therefore, there can be no inconsistency with *Garmon.*

Petitioners erroneously contend that the Wisconsin Court's decision conflicts with *Local 20, Teamsters, etc. v. Morton,* 377 U.S. 252 (1964). In *Morton,* the action was brought pursuant to Section 303 of the Labor Management Relations Act (29 U.S.C. §187) which authorized suit by any person injured as a result of specified secondary conduct prohibited by that Section. The Ohio Federal District Court found that the Union had violated Section 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. This Court affirmed such finding of a "clear violation of §303." 377 U.S. at 256.

The Union in *Morton* had, however, engaged in another instance of secondary activity, a *direct* approach

[11] *See, supra,* p. 5, and Note 4, thereat.

by the Union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was *not* in violation of Section 303 since the Union had approached the neutral employer directly, rather than through its employees, the court, nevertheless, awarded damages on the basis of state common law.

This Court reversed the latter award, even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting:

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) *comprehensively* and with *great particularity* 'describes and condemns *specific union conduct* directed to *specific objectives.*'" (377 U.S. at 258; Emphasis supplied).

The Court concluded:

> "If the Ohio law of secondary boycott can be applied to proscribe the *same type of conduct* which Congress *focused upon but did not proscribe* when it enacted §303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, ..." (377 U.S. at 259-260; Emphasis supplied).

The decision in *Morton* is an exception[12] to the basic prohibited-protected test set forth in *Briggs and Stratton* and *Garmon*. However, that exception is an extremely narrow one, applicable only where Congress has "focused upon" the conduct in question without prohibiting it.

[12] Other limited exceptions, not relevant to this case, have also been recognized. For example, a state may enjoin violence even though it may also be an unfair labor practice. *United Automobile, A, & A.I.W. of America v. Wisconsin Employment Relations Board, et al.*, 351 U.S. 266 (1956); *International Union, etc. (UAW-CIO) v. Russell*, 356 U.S. 634 (1958).

Such is *not* the case here.[13] Unlike the very *comprehensive* statutory treatment of secondary boycotts, Congress has *not* "focused upon" partial or "quickie" strikes.[14] In fact, "policing of such conduct is left wholly to the states." *Briggs and Stratton*, 336 U.S. at 253. In the absence of such "focusing," there is simply no conflict with *Morton*.

Petitioners rely on the decision in *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960) to support their claim of a Congressional determination to deny the states the right to regulate unprotected partial strikes. Yet, *Insurance Agents* had *nothing whatsoever* to do with preemption or state power to regulate. That case simply held that similar disruptive tactics were not prohibited under Section 8 of the NLRA, and that the NLRB was not authorized by statute to function as an arbiter of economic weapons in administering the refusal to bargain provisions (Sections 8(a)(5) and 8(b)(3)) of the Federal Act.

The Wisconsin Circuit Court in this case correctly stated:

> "To conclude from this language [in *Insurance Agents*] that the State is barred by the doctrine of

[13] A *Morton*-like situation *would* be presented if Congress had outlawed recurrent and other forms of partial strikes without prohibiting a concerted refusal to work overtime.

[14] Petitioners' assertion of a Congressional determination to bar state regulation of such conduct by the defeat of a proposed amendment to the NLRA in 1947 is unfounded (Petition 14-15). That amendment would have prohibited only sit-down strikes and plant seizures and not the conduct here in question and it is impossible to determine why the provision was deleted. An equally plausible explanation is that state regulation was contemplated and deemed sufficient. In any case, the "focus[ing]" referred to in *Morton* was the *enactment* of legislation comprehensively regulating the specific conduct in question, not merely the introduction of a bill.

preemption is a giant step. The decision does not hold that state law does not apply, and to infer from the language employed by the court that it did would be tenuous. . . ." (Pet. App. A-19).

We respectfully submit that the decision of the Court below was not only consistent with, but compelled by this Court's holdings in *Briggs and Stratton* and *Garmon* and that the decisions in *Morton* and *Insurance Agents* have no application to the facts presented here.

III. THERE IS NO REASON FOR THIS COURT TO OVERRULE ITS DECISION IN *BRIGGS AND STRATTON* AND TO RADICALLY ALTER THE PREEMPTION STANDARDS ESTABLISHED IN *GARMON*.

It is Petitioners, not the Wisconsin Court, whose theories of preemption are inconsistent with the decisions of this Court. In reality, Petitioners would have this Court overrule *Briggs and Stratton* and alter the preemption standards set forth in *Garmon* by a radical expansion of the *Morton* exception. *They would classify some "self-help" weapons as protected, some as prohibited, and the remainder as "permitted."* In *each* case, the states would be *totally ousted* from control of that conduct. Rather than accept this Court's conclusion that "much . . . is left to the States,"[15] Petitioners would leave nothing. In effect, that result would immunize such "permitted" activities from *any* regulation, thereby according them a "protection" not intended either by Congress or by the holdings of either the NLRB or this Court.

[15] *Amalgamated Ass'n of Street, etc. Employees v. Lockridge,* 403 U.S. 274, 289 (1971).

We respectfully submit that the Union has shown no necessity[16] whatsoever for such a significant change. Under *Briggs and Stratton* and *Garmon,* the states are allowed to regulate only where the subject of that regulation is not arguably protected or prohibited, and where the conduct has not been comprehensively focused upon by Congress as in *Morton.* Operating within these limits, Wisconsin has developed a procedure whereby unprotected, improper Union-directed conduct can be dealt with by administrative agency (WERC) action against the offending Union rather than by self-defeating disciplinary action against individual employees. We see no reason to eliminate such procedures where there is no interference with Federally protected rights.

In *Lockridge,* this Court stated:

> ". . . While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." (403 U.S. at 302).

We respectfully submit that Petitioners have not even come close to carrying that burden.

[16] There has been *no evidence* of any disruption or imbalance in labor relations in Wisconsin even though the statute in question has been in effect for 36 years.

CONCLUSION

The decision of the Wisconsin Supreme Court is plainly correct under the principles enunciated by this Court, and there is not presented a new or substantial federal question warranting review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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